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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MELISSA W.,

10 Plaintiff,

CASE NO. C18-5410-MAT

11 v.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

12 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

13 Defendant.
14

15 Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of
16 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
17 application for Supplemental Security Income (SSI) after a hearing before an Administrative Law
18 Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all
19 memoranda of record, this matter is AFFIRMED.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1968.¹ She completed high school. (AR 195.) Other than
22 odd jobs, plaintiff has not worked since 1985. (AR 196.)

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¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff filed an SSI application in October 2014, alleging disability beginning January 1,
2 2000. (AR 331.) Her application was denied initially and on reconsideration.

3 On June 23, 2016, ALJ Gene Duncan held a hearing, taking testimony from plaintiff, a
4 medical expert (ME), and a vocational expert (VE). (AR 190-235.) On March 3, 2017, the ALJ
5 issued a decision finding plaintiff not disabled. (AR 37-51.)

6 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
7 April 6, 2018 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.
8 Plaintiff appealed this final decision of the Commissioner to this Court.

9 **JURISDICTION**

10 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

11 **DISCUSSION**

12 The Commissioner follows a five-step sequential evaluation process for determining
13 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
14 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
15 engaged in substantial gainful activity since the application date. At step two, it must be
16 determined whether a claimant suffers from a severe impairment. The ALJ found severe plaintiff's
17 headaches controlled effectively with medication; right foot tendonitis; L4-5 degeneration; first
18 degree anterior spondylolisthesis of L3 and L4; and cervical degenerative disc disease with
19 moderate canal stenosis. Step three asks whether a claimant's impairments meet or equal a listed
20 impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed
21 impairment.

22 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
23 residual functional capacity (RFC) and determine at step four whether the claimant has

1 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
2 light work, except that she can stand and/or walk for four hours out of an eight-hour workday;
3 should not climb ladders, work at heights, or work near hazards; should not crawl; can occasionally
4 perform other postural movements; can perform simple repetitive work; can have superficial
5 public contact; and should not make business decisions. Plaintiff had no past relevant work to
6 consider at step four.

7 If a claimant demonstrates an inability to perform past relevant work, or has no past
8 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
9 retains the capacity to make an adjustment to work that exists in significant levels in the national
10 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
11 such as work as a street cleaner, flagger, and parking lot signaler.

12 This Court's review of the ALJ's decision is limited to whether the decision is in
13 accordance with the law and the findings supported by substantial evidence in the record as a
14 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
15 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
16 by substantial evidence in the administrative record or is based on legal error.") Substantial
17 evidence means more than a scintilla, but less than a preponderance; it means such relevant
18 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
19 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
20 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
21 F.3d 947, 954 (9th Cir. 2002).

22 Plaintiff argues the ALJ failed to provide sufficient reasons to reject her subjective claims
23 and that those errors implicated the RFC, the hypothetical proffered to the VE, and the step five

1 finding. She requests remand for an award of benefits or, in the alternative, for further
2 administrative proceedings. The Commissioner argues the ALJ's decision has the support of
3 substantial evidence and should be affirmed.

4 Symptom Testimony

5 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing
6 reasons to reject a claimant's testimony. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).
7 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and
8 what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th
9 Cir. 1996). In considering the intensity, persistence, and limiting effects of a claimant's symptoms,
10 the ALJ "examine[s] the entire case record, including the objective medical evidence; an
11 individual's statements about the intensity, persistence, and limiting effects of symptoms;
12 statements and other information provided by medical sources and other persons; and any other
13 relevant evidence in the individual's case record." Social Security Ruling (SSR) 16-3p.²

14 Plaintiff testified she was not working due to some physical limitations and migraines. (*See*
15 AR 44.) She had two, sometimes three migraines a month, lasting two-to-three days, with an
16 additional day to recover. The use of rizatriptan at onset sometimes lessened the headaches and
17 had prevented headaches, but not often. (*See* AR 44-45.) Plaintiff had had migraines for as long
18 as she could remember, and just put up with them and used aspirin until she recently started going
19 to a doctor. (*See* AR 45.) Her migraines had worsened and became more frequent as she got older,
20 and were triggered by stress and getting angry. She had never been to a hospital for a migraine
21 and had not earlier thought of seeing a doctor even though she had medical insurance. She received

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23 ² Effective March 28, 2016, the Social Security Administration eliminated the term "credibility"
from its policy and clarified the evaluation of a claimant's subjective symptoms is not an examination of
character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term credibility.

1 a referral to a neurologist only three weeks prior to the hearing, saw neurologist Dr. John Miller
2 one week prior, and had an MRI scheduled for the following day. She had not previously discussed
3 a referral to a neurologist with her primary care provider.

4 Plaintiff also has scoliosis and slipped discs in her back, and lower back pain. She had
5 been taking hydrocodone and cyclobenzaprine for her back and avoided lifting heavy things. The
6 medications made her tired, but she did not take naps during the day. She could only walk five
7 minutes before her back and right foot started hurting and could stand for five minutes or less. She
8 sometimes has trouble sitting and has trouble sitting all the time, but did not demonstrate trouble
9 sitting during the hearing and only stood when her representative asked if she needed to stand. She
10 also had trouble sleeping and using her hands. (AR 215, 218-19.)

11 Plaintiff testified she has been separated from her husband for the last fourteen years, lives
12 with a friend, and supported herself with odd jobs, such as housecleaning and babysitting. She has
13 not done any odd jobs for about two years. (*See* AR 45.) The ME testified little had been done in
14 the way of treatment for plaintiff's symptoms, recommended referral to a neurologist for migraine
15 treatment, and opined plaintiff's migraines would be helped significantly with appropriate
16 treatment.

17 The ALJ found plaintiff's statements concerning the intensity, persistence, and limiting
18 effects of her symptoms not entirely consistent with the medical evidence and other evidence in
19 the record. (*Id.*) He found the objective medical evidence and treatment record inconsistent with
20 plaintiff's allegations of disabling physical limitations. In describing the record (*see* AR 45-48),
21 the ALJ discussed evidence associated with plaintiff's treatment and use of medications, including
22 evidence showing her pain symptoms were adequately controlled with medications and of a failure
23 to comply with prescribed treatment or follow through with treatment recommendations. (*See, e.g.,*

1 AR 527 (September 2015: “Clearly the benefits of these medications have allowed the patient to
2 have reasonable function.”); AR 676 (September 2015: reporting use of rizatriptan as needed for
3 migraines, hydrocodone and ibuprofen 800 for back pain, and cyclobenzaprine for muscle
4 relaxation when in spasm; “Current efficacy: Highly effective”; “Description of efficacy: The
5 meds work.”); AR 540 (December 2015: “She has only been trying the maxalt once with a
6 headache and not repeating second dose after 2 hours.”); AR 545 (February 2016: “States has not
7 been using as many, as the Maxalt seems to be helping her.”); AR 550 (March 2016: “We have
8 discussed several times in the past to start her on a daily medication to prevent her headaches, but
9 she has always refused, and stayed with hydrocodone, flexeril, and maxalt, stating these seemed
10 to help. She has never seen a neurologist, had an MRI, she has consistently come in every 6 to 8
11 weeks, never complaining that things are worse. I told her disability would refuse her based on
12 lack of follow up or other options for treatment.”)) The ALJ noted inconsistency between
13 plaintiff’s testimony a referral to a neurologist had not been previously discussed and evidence
14 from a treating provider³ suggesting plaintiff had been unwilling to see a neurologist. (See AR 48,
15 550 (described above) and AR 555 (May 16, 2016: “She is now willing to see Neurology to talk
16 about options for her progressive migraines, that occur 2 to 3 times per month, lasting 2-3 days,
17 and leaving her, in her words, ‘stupid.’”))

18 The ALJ also found plaintiff’s activities inconsistent with disabling limitations and
19 demonstrating her ability to work consistent with the assessed RFC. (AR 48.) He pointed to
20 plaintiff’s testimony she did most of the housework, reads, drives once or twice a week, and went
21 on a trip to California with a friend to visit another friend within the past year, and her report she
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23 ³ This evidence came from a treating physician assistant, not a physician, as stated by the ALJ. (See AR 48 (describing evidence from “PA-C Franks” and “Dr. Frank’s [sic]”).)

1 prepares meals, shops, and plays cards with friends. The ALJ observed that none of plaintiff's
2 treating providers had opined she had disabling limitations. (*Id.*) He accorded some weight to the
3 opinions of one State agency non-examining physician, some and little weight to portions of
4 another such physician's opinions, and stated, in relation to the ME, that "in the absence of any
5 details from a diagnostic or therapeutic program, there is insufficient evidence from him to form
6 an opinion regarding the claimant's [RFC]." (AR 48-49.)

7 "While subjective pain testimony cannot be rejected on the sole ground that it is not fully
8 corroborated by objective medical evidence, the medical evidence is still a relevant factor in
9 determining the severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*,
10 261 F.3d 853, 857 (9th Cir. 2001); SSR 16-3p. An ALJ therefore properly considers whether the
11 medical evidence supports or is consistent with a claimant's allegations. *Id.*; 20 C.F.R. §
12 416.1529(c)(4) (symptoms are determined to diminish capacity for basic work activities only to
13 the extent the alleged functional limitations and restrictions "can reasonably be accepted as
14 consistent with the objective medical evidence and other evidence.") An ALJ may reject subjective
15 testimony upon finding it contradicted by or inconsistent with the medical record. *Carmickle v.*
16 *Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148
17 (9th Cir. 2001).

18 An ALJ properly considers inconsistencies in a claimant's reporting, *Greger v. Barnhart*,
19 464 F.3d 968, 972 (9th Cir. 2006), and evidence associated with treatment, §§ 404.1529(c)(3),
20 416.929(c)(3), SSR 16-3p, including a lack of treatment, *Burch v. Barnhart*, 400 F.3d 676, 681
21 (9th Cir. 2005), and unexplained or inadequately explained failure to seek, comply, or follow
22 through with treatment, *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). An ALJ may
23 consider whether a claimant's activities contradict testimony as to the degree of impairment. *Orn*

1 v. *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Finally, an ALJ may rely, in part, on his or her own
2 observations, see *Quang Van Han v. Bowen*, 882 F.2d 1453, 1458 (9th Cir. 1989), so long as the
3 observations are not a substitute for a medical diagnosis, *Marcia v. Sullivan*, 900 F.2d 172, 177,
4 n.6 (9th Cir. 1990).

5 Plaintiff argues the ALJ erred in considering the objective medical evidence and the
6 evidence of her activities. Because plaintiff did not address the other reasons offered by the ALJ
7 in support of his conclusion, the Court finds any challenge to those reasons waived. *Indep. Towers*
8 *of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003). The Court further, and for the reasons
9 set forth below, finds no error established.

10 A. Objective Medical Evidence

11 Plaintiff contends the ALJ did not review, discuss, or appreciate objective evidence in the
12 record, including June 15, 2016 x-rays of her cervical spine showing severe multilevel
13 degenerative changes, along with pain and radiculopathy (AR 726), and evidence from Dr. Miller
14 addressing her cervical pain, migraines, and carpal tunnel syndrome (CTS) (AR 755, 758, and 761
15 (described below)). She notes the ALJ's failure to discuss her detailed headache logs and asserts
16 the failure of both the ALJ and ME to recognize the significance of her extreme and ongoing pain
17 medications. Plaintiff argues that Dr. Miller, in not suggesting any reason to reject plaintiff's
18 incapacitating chronic headaches, significant cervical pain, and numb leg spasms, endorsed and
19 gave credence to those claims. (See AR 761 (June 24, 2016: "Patient with chronic headache
20 syndrome. At this time she has severe degenerative changes of her cervical spine. She has lower
21 extremity hyperreflexia raising the question of cord compression. I think we need to look into this
22 further. She probably has multifactorial issues. There are also sinus issues with left maxillary
23 sinusitis."); AR 758 (July 7, 2016: "Patient returns today. She continues to have a variety of issues.

1 This includes headaches which are incapacitating. Maxalt is helpful. She is at least conceivably
2 interested in a prophylactic. She also has significant cervical pain and at times her legs feel numb
3 and weak. They almost seem to give her more problems at night. They get spasms at night as
4 well. There have been no other acute changes. She doesn't remember any particular history of
5 trauma."); AR 755 (July 26, 2016: "In terms of her headaches, it may be worthwhile trying a
6 migraine preventative."; "In terms of CTS, it may be worthwhile at some point seeing an
7 orthopedist to consider intervention."; "Also discussed her MRI of the cervical findings. I do think
8 she probably needs [follow up] with either a neurosurgeon or spinal surgeon. She could get a
9 referral through her [primary care provider (PCP)]. I am not sure this is an immediate need of
10 intervention but I do think a plan needs to be put in place going forward. She would need to get a
11 referral through her PCP.")).

12 Because they were submitted to the Appeals Council after the ALJ's March 3, 2017
13 decision (*see* AR 8-11, 21-25), neither the ALJ, nor the ME could have considered the headache
14 logs. The Appeals Council found the logs, dated between March 18 and July 16, 2017 and between
15 July 18 and September 18, 2017 (*see id.*), did not relate to the period at issue and did not affect the
16 decision regarding disability on or before March 3, 2017. (AR 2 (noting plaintiff may file a new
17 application for consideration of a claim of disability after March 3, 2017).)

18 The ALJ's decision does reflect his consideration of the evidence from Dr. Miller, as well
19 as the remainder of the medical evidence relating to plaintiff's cervical pain, headaches/ migraines,
20 and CTS. At step two, the ALJ discussed the cervical spine MRI taken after the hearing and the
21 earlier x-ray, and showing degenerative disc disease with moderate canal stenosis at C3-4. (AR
22 39.) He cited to Dr. Miller's July 26, 2016 treatment note in finding plaintiff's cervical condition
23 a severe impairment. (*Id.* (citing AR 755).) The ALJ found the evidence to support a finding of a

1 severe impairment of headaches controlled effectively with medication, and discussed plaintiff's
2 hand-related complaints and the evidence showing mild right and moderate left CTS. He found
3 the record inconsistent with the allegation of hand problems, citing medical records and plaintiff's
4 March 2016 report she was considering learning how to knit and crochet, and stated the July 2016
5 CTS diagnosis did not show an impairment persisting for twelve continuous months. (AR 40
6 (citations omitted).) Plaintiff points to evidence associated with CTS, but does not assert or
7 support error in the ALJ's step two finding in relation to that condition.

8 At step four, the ALJ described cervical spine x-rays taken in 2013 (AR 45-46), treatment
9 records addressing headaches and migraines (AR 46-48), and evidence from Dr. Miller (AR 48).
10 The ALJ stated that, on June 15, 2016, Dr. Miller noted there had been no workup and no
11 prophylactic therapy for headaches and ordered an MRI of the brain. He described June 24, 2016
12 MRI findings showing minimal subcortical white matter hyperintensity likely sequelae of vascular
13 headache or small vessel ischemic disease, but no evidence of demyelinating disease. (AR 48
14 (citing AR 760).) He considered Dr. Miller's July 7, 2016 recommendation of prophylactic
15 therapy and plaintiff's response "that at that time she just wanted to get further information and
16 would let him know if he could be of benefit going forward." (*Id.* (citing AR 761).) The ALJ noted
17 that, following the July 26, 2016 cervical spine MRI, Dr. Miller commented plaintiff's headaches
18 may be triggered by her cervical region, and recommended a migraine preventative and a follow-
19 up with a surgeon for the cervical findings. (*Id.* (citing AR 755).)

20 The ALJ need not discuss each piece of evidence in the record. *Vincent v. Heckler*, 739
21 F.2d 1393, 1394-95 (9th Cir. 1984). The ALJ, instead, "must explain why 'significant probative
22 evidence has been rejected.'" *Id.* (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).
23 *Accord Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995). The ALJ must consider all medical

1 opinion evidence. *Tommasetti*, 533 F.3d at 1041. However, where a physician does not assess
2 any functional limitations, the ALJ need not provide reasons to reject a physician's statement. *See*
3 *Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010). The ALJ, moreover,
4 bears the "final responsibility" for determining a claimant's RFC. SSR 96-5P. *Accord* 20 C.F.R.
5 § 416.927(d)(2), 416.946(c). That responsibility includes "translating and incorporating clinical
6 findings into a succinct RFC." *Rounds v. Comm'r, SSA*, 807 F.3d 996, 1006 (9th Cir. 2015).

7 Dr. Miller did not offer an assessment of functional limitations or other medical opinion
8 regarding plaintiff's cervical spine impairment, headaches/migraines, CTS, or any other condition.
9 The ALJ properly considered the evidence from this physician in addressing plaintiff's
10 impairments at step two and in assessing the RFC. Having considered and accepted the cervical
11 spine MRI results and Dr. Miller's interpretation of those results, it cannot be said the ALJ erred
12 in failing to also specifically address the cervical spine x-ray taken one month earlier. Nor does
13 the evidence reflecting plaintiff's symptom reporting to Dr. Miller, Dr. Miller's observations prior
14 to MRIs and other testing, and his later recommendations as to possible treatment (*see* AR 755,
15 758, 761) constitute opinion evidence necessitating evaluation by the ALJ. Plaintiff therefore fails
16 to establish error in relation to Dr. Miller.

17 The ALJ also considered evidence associated with plaintiff's use of pain medication.
18 Plaintiff argues the prescription of hydrocodone/Norco four times a day and cyclobenzine as a
19 muscle relaxer indicates her treating providers found her neck, back, and headache pain credible
20 and chronic. *Scrogam v. Colvin*, 765 F.3d 685, 701 (7th Cir. 2014). However, the mere existence
21 of these prescriptions does not suffice to establish disability. The ALJ considered both plaintiff's
22 use of these medications and evidence she had been counseled to decrease that use and pursue
23 other avenues of treatment. (*See* AR 46-47 (citing AR 645-46 (September 25, 2014: Norco for

1 ankle pain discontinued and advised to use ibuprofen); AR 520 (July 15, 2015, Dr. Michael Buben:
2 “I am very reluctant to give her more hydrocodone at her age as this usually can become a slippery
3 slope. She has used ibuprofen in the past I encouraged her to use that as well today.”); AR 540
4 (December 8, 2015, PA-C Franks: “She states she is needing refill of hydrocodone[.] . . . I did
5 warn about cross addiction, will continue to monitor, as she has been requesting every 5 to 6 weeks,
6 and used to be every three months or so.”); AR 550 (in March 2016, Franks noted she repeatedly
7 advised plaintiff to utilize daily medication for headache prevention, plaintiff’s refusal and reliance
8 on hydrocodone, flexeril, and Maxalt, and that plaintiff had not pursued other options for treatment
9 or complained of worsening symptoms).) (*See also* AR 538, 543 (in October and December 2015,
10 Franks “encouraged the patient to try to continue to decrease the amount of narcotic usage and to
11 use other medications that are over the counter when possible.”)) The ALJ construed the record
12 to suggest adequate management of plaintiff’s symptoms with medication, considered plaintiff’s
13 report the medications worked and were highly effective, and considered other evidence showing
14 plaintiff’s failure to pursue, comply, or follow through with other treatment recommendations.
15 (*See* AR 46-48.)

16 The ALJ also considered the ME’s testimony very little had been done in the way of
17 treatment for plaintiff’s symptoms and that appropriate treatment for her migraines would help
18 considerably. (AR 45.) The ME stated: “In essence, the treatment that she’s receiving seems to
19 be primarily medication from a discomfort point of view, and that’s dealing with symptoms as
20 opposed to trying to deal with the problem that’s producing the symptoms, which is the kind of
21 thing that I think she needs.” (AR 208.) He testified attempting to opine as to RFC would be very
22 difficult “in the absence of any aggressive type of treatment program” and that it was very possible
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1 plaintiff's migraines and other symptoms could be helped considerably with appropriate treatment.
2 (AR 209-11.)

3 Plaintiff, in sum, does not demonstrate error in the ALJ's finding of inconsistency between
4 the objective medical evidence and plaintiff's symptom testimony. The ALJ's interpretation of
5 the evidence is rational and supported by substantial evidence. It therefore serves as one of several
6 different specific, clear, and convincing reasons for discounting plaintiff's testimony as to the
7 degree of her impairment.

8 B. Activities

9 Plaintiff argues the modest activities identified by the ALJ as inconsistent with her
10 testimony could all be performed in a self-scheduled way, with help from friends, opportunities
11 for rest and medication breaks, and without any minimal performance standards. She denies the
12 activities discredit her claims or that they reflect the rigors of work, with performance standards
13 and limited time for breaks. She denies incompatibility between her activities and her severe
14 cervical degeneration, as shown by objective evidence and validated by her medication regimen.

15 The Court finds no error. As reflected above, plaintiff testified she could stand or walk for
16 only five minutes at a time, could not grip items for long, and had trouble sitting for extended
17 periods. The ALJ rationally construed evidence showing plaintiff does most of the housework,
18 drives, went on a trip to California, prepares meals, shops, and plays cards as inconsistent with her
19 testimony. The ALJ did not entirely discredit plaintiff's claims. He found severe impairments and
20 assessed an RFC accounting for limitations in functioning. While plaintiff construes the evidence
21 of her activities differently, the ALJ's at least equally rational interpretation of the evidence
22 withstands scrutiny. The ALJ properly considered inconsistency with activities as one of several
23 different reasons for discounting plaintiff's testimony as to the degree of her impairment.

1 Steps Four and Five

2 Plaintiff's assertion of error in the RFC, hypothetical questions to the VE, and step five
3 finding is entirely dependent on a finding of error in the evaluation of her symptom testimony.
4 Having failed to establish any such error, this mere restating of plaintiff's argument does not
5 establish error at step four or step five. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76
6 (9th Cir. 2008).

7 CONCLUSION

8 For the reasons set forth above, this matter is AFFIRMED.

9 DATED this 3rd day of April, 2019.

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11 _____
12 Mary Alice Theiler
13 United States Magistrate Judge
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